Supreme Court, U.S.
FILED
AUG - 4 2000
CLERK

(2)

No. 00-50

In The

Supreme Court of the United States

R.E.W.,

Petitioner,

v.

C.A.M. & ANOTHER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Judicial Court Of Massachusetts

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PAMELA N. JOSEPH
309 Washington Street
Brighton, MA 02135
(617) 782-0080

EDWARD A. GOTTLIEB
Counsel of Record
309 Washington Street
Brighton, MA 02135
(617) 789-5678

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

12pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statutory Provisions Involved 1

Statement of the Case 1

Reasons for Denying the Petition 4

I. The Petitioner Has Failed To Meet His Burden Of Showing That The Federal Issue Was Properly Presented To Or Addressed By The State Court 4

II. The Decision Below Does Not Conflict With The Decisions Of This Court 6

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) 5

Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) 5

Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) 7

C.C. v. A.B., 409 Mass. 679, 550 N.E.2d 365 (1990) 2, 4, 6, 7, 8

LaPointe v. License Board of Worcester, 389 Mass. 454, 451 N.E.2d 112 (1983) 5

Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) 7

Michael H. v. Gerald D., 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) 6, 7, 8

M.J.C. v. D.J., 410 Mass. 389, 572 N.E.2d 562 (1991) ...3, 4

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) 7

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1028, 31 L.Ed.2d 551 (1972) 7

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) 6

UNITED STATES CONSTITUTION

Fifth and Fourteenth Amendments ..... *passim*

STATUTES:

Massachusetts General Laws c. 209C §5(a) 1, 6, 7

Massachusetts General Laws c. 215 §6 1

STATUTORY PROVISIONS INVOLVED

MASSACHUSETTS GENERAL LAWS, CHAPTER 209C, §5(a)

§5. Persons entitled to maintain actions or execute voluntary acknowledgment of parentage; parties

(a) . . . if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints to establish paternity under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.

STATEMENT OF THE CASE

The Respondents hereby address certain misstatements of fact and law contained in the Petition.

In his original complaint filed with the Essex County Probate and Family Court of Massachusetts, R.E.W. sought to establish paternity pursuant to Massachusetts General Laws Chapter 209C. C.A.M. moved to dismiss for lack of standing, asserting that c. 209C §5(a) prohibits anyone from bringing an action to establish paternity of a child born to a married woman other than a person who is or was the woman's husband at the time of the child's birth or conception.

R.E.W. then filed an amended complaint under Massachusetts General Laws c. 215 §6 based on the holding of the Supreme Judicial Court of Massachusetts in *C.C. v.*

A.B., which allows a putative father in such circumstances to bring a paternity action under the Probate Court's general equity jurisdiction where he can demonstrate by clear and convincing evidence that he has a substantial relationship with the child. *C.C. v. A.B.*, 409 Mass. 679, 690-691, 550 N.E.2d 365, 372-373 (1990). The case left open the question of what rights, if any, a putative father might have in a case where the father demonstrates that his failure to form a substantial relationship with the child was due to the actions of the mother. *Id.*, 406 Mass. at 690, n. 10; 550 N.E.2d at 372, n. 10.

A preliminary hearing as mandated by *C.C. v. A.B.* was held to determine whether R.E.W. could establish a parent-child relationship or alternatively, that he had been prevented from having such a relationship by the actions of the mother. Pet. at 2a, 12a-13a. The question is by its very nature fact-based. *C.C. v. A.B.*, 409 Mass. at 690, 550 N.E.2d at 372. R.E.W.'s "Proposed Findings of Fact, Rationale and Conclusions of Law" submitted at the conclusion of the hearing cited in passing a few cases of this court, but at no time challenged the constitutionality of the preliminary standing test established in *C.C. v. A.B.*, or claimed that the standard is not consistent with due process or with the decisions of this court.

After a three-day hearing, the probate judge made detailed and comprehensive findings of fact in which he found that R.E.W.'s failure to form a relationship with the child was not due to C.A.M.'s actions, but rather to his own indifference. Pet. at 6a-14a. The Petitioner misstates both the record and the judge's factual findings when he claims that R.E.W. could not have known that he might be the child's father until March 9, 1998, approximately two

(2) months after the child's birth. Pet. at 7. To the contrary, the trial judge specifically found that R.E.W. was on notice of his possible paternity since May 1997 when C.A.M. told him she was pregnant. Pet. at 9a-10a. This finding was supported by Petitioner's own testimony, in which he admitted on cross-examination that he was aware of his possible paternity in May 1997.

The probate judge found that, "[d]espite being in regular communication with one another and despite [R.E.W.] knowing that he had intercourse with [C.A.M.] at about the time the child she was carrying could have been conceived, there was no evidence that during the pregnancy [R.E.W.] ever suggested to [C.A.M.] that he was interested in asserting any possible claim to paternity." Pet. at 9a-10a. The judge also found that during the initial months of the child's life, R.E.W. made no effort to form a relationship with the child until his relationship with C.A.M. had broken down. Pet. at 14a. C.A.M.'s husband, in contrast, assumed the role of the child's father, was present at the birth, was listed as the father on the birth certificate, acknowledged the child as his own, participated actively in caring for the child, as well as for the child's older sibling, and treated the child in all respects as his biological son. Pet. at 8a. The probate judge's findings were based on a well-developed factual record and on credibility determinations which must be accepted unless clearly erroneous. *M.J.C. v. D.J.*, 410 Mass. 389, 394-395, 572 N.E.2d 562, 565 (1991).

Based on these facts, the probate judge concluded that R.E.W. had, at the very least, failed to show by clear and convincing evidence that C.A.M.'s actions were the

cause of his failure to establish, or even attempt to establish, a relationship with the child, and accordingly dismissed the complaint. Pet. at 14a. Thus, as a factual matter, the issue left open in *C.C. v. A.B.* was never reached. *M.J.C. v. D.J.*, 410 Mass. at 389, 572 N.E.2d at 565. The constitutionality of the two-part test in *C.C. v. A.B.* was not addressed in the decision below because the issue had never been presented to the probate court.

R.E.W.'s arguments on appeal were based on challenges of the probate judge's findings of fact. Pet. at 17a. Since those findings were based upon credibility determinations and were supported by the record, the Appeals Court declined to set them aside. *Id.*

In his petition for further appellate review, R.E.W. similarly failed to clearly address any constitutional issue. R.E.W.'s argument that the two-part test of *C.C. v. A.B.* is not consistent with due process is raised for the first time in the Petition.

REASONS FOR DENYING THE PETITION

I. THE PETITIONER HAS FAILED TO MEET HIS BURDEN OF SHOWING THAT A FEDERAL ISSUE WAS PROPERLY PRESENTED TO OR ADDRESSED BY THE STATE COURT.

Since the decision below was decided as a factual matter under applicable state law, the Petitioner has failed to show that this matter involves any federal question. Moreover, even if a federal question exists, Petitioner has failed to meet his burden of showing that the

question was timely and properly raised in the state court.

In reviewing a state court judgment, this court has, with very rare exceptions, refused to consider a federal claim unless it was either addressed by or properly presented to, the state court. *Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S.Ct. 1028, 1029, 137 L.Ed.2d 203 (1997). The Petitioner has the burden of showing that the issue was properly presented so that the state court had a fair opportunity to address the federal question. *Id.* In order to meet this burden, the Petitioner must establish that the federal issue was raised in the state court in a timely manner and as required by state law. *Id.*

The Petitioner failed to present a federal issue to the trial court. The mere citation of federal cases is insufficient to inform a state court that it has been presented with a federal claim. *Id.*, 520 U.S. at 88, 117 S.Ct. at 1030, 137 L.Ed.2d, *citing Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, n. 9, 107 S.Ct. 1940, 1948, n. 9, 95 L.Ed.2d 474 (1987). Federal constitutional issues which are not raised at trial will not be heard on appeal in the Massachusetts appellate courts. *LaPointe v. License Board of Worcester*, 389 Mass. 454, 457, 451 N.E.2d 112, 115 (1983).

The Petitioner has failed to demonstrate that the federal question was clearly presented to the Massachusetts Appeals Court, which correctly characterized the appeal as a challenge to the probate judge's findings of fact. Pet. at 17a. The Petitioner has also failed to demonstrate that the issue was clearly presented to the Supreme Judicial Court of Massachusetts, which summarily denied

further appellate review. Pet. at 18a-19a. "[W]hen, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

Thus, even if any federal issue is raised in the Petition, the Petitioner has failed to make an affirmative showing that the Massachusetts state courts had an opportunity to address the federal issue, and the Petition should be therefore denied.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT.

Petitioner argues that application of the two-part test set forth in *C.C. v. A.B.* denied him due process. However, the Petitioner has failed to show that the decisions of this court would entitle him to greater due process rights than those afforded him in the Massachusetts trial court. In fact, the Massachusetts highest court has gone beyond the decisions of this court in affording due process rights to putative fathers in R.E.W.'s circumstances.

In 1987, Massachusetts enacted a paternity statute which precluded a putative father from establishing paternity of a child conceived or born during the mother's marriage to another, or within 300 days of the termination of the marriage. Massachusetts General Laws, c. 209C §5(a). In *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), this court

upheld a similar provision of a California law. The plurality opinion held that the putative father did not have a protected liberty interest in a relationship with the child. *Id.*, 491 U.S. at 121-130, 109 S.Ct. at 2341-2346, 105 L.Ed.2d 91.

In *C.C. v. A.B.*, the plaintiff, who sought to establish his paternity of a child born to A.B. during her marriage to another man, challenged the constitutionality of the prohibition in c. 209C §5(a). The Supreme Judicial Court of Massachusetts held that the statute did not preclude the putative father in such circumstances from bringing a petition for paternity under the general equity jurisdiction of the Probate Court. *C.C. v. A.B.*, 406 Mass. at 682, 550 N.E.2d at 368. The Massachusetts court took note of the fact that four Justices of this court felt that a biological father has a protected interest in a relationship with the child under certain circumstances. *Id.*, 406 Mass. at 686, 550 N.E.2d at 370, *citing Michael H.*, 491 U.S. 110, 109 S.Ct. 2349-2363, 105 L.Ed.2d at 91 (dissenting opinions of Brennan and White, JJ). However, the Massachusetts court determined that the protected interest is not based solely on biology, but arises only when a substantial relationship exists with the child. *Id., comparing Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) and *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), *with Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1028, 31 L.Ed.2d 551 (1972). The Massachusetts highest court's position on this issue is similar to the position taken by Justice Brennan in his dissent in *Michael H.*, in which he stated that " . . . although an unwed father's biological link to his

child does not, in and of itself, guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so." *Michael H.*, 491 U.S. at 142-143; 109 S.Ct. at 2352; 105 L.Ed.2d 91 (Brennan, J. dissenting).

The preliminary standing test was established by the Massachusetts court as a means of balancing the due process interest of a putative parent in a developed relationship with a child against the strong public policy of protecting the family unit. *C.C. v. A.B.*, 406 Mass. at 691, 550 N.E.2nd at 372-373. The state has a legitimate interest in protecting the marital family. *Michael H.*, 491 U.S. at 123-124, 129, 109 S.Ct. at 2342, 2345, 105 L.Ed.2d 91. In devising this test, the Massachusetts Supreme Judicial Court gave thorough consideration to this court's decisions, and in fact went beyond this court's decision in *Michael H.* in affording due process rights to putative fathers even where the child's mother is married to another. Therefore, in asking this court to invalidate the Massachusetts case law, the Petitioner is also asking this court to revisit its decision in *Michael H.*, a request that is utterly groundless since no federal question was properly raised below.

The decision below was decided on factual grounds under the principles of *C.C. v. A.B.* Petitioner has advanced no reasons why the two-part test of *C.C. v. A.B.* offends concepts of due process as articulated by this court. The Petition should therefore be denied.

CONCLUSION

For the foregoing reasons Respondents respectfully request that the Petition be denied.

Respectfully submitted,

EDWARD A. GOTTLIEB
Counsel of Record
LAW OFFICES OF EDWARD A. GOTTLIEB
309 Washington Street
Brighton, MA 02135
(617) 789-5678

PAMELA N. JOSEPH
309 Washington Street
Brighton, MA 02135
(617) 782-0080